

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)
)
TIME WARNER CABLE,)
A Division of)
TIME WARNER)
ENTERTAINMENT COMPANY, L.P.)
)
Emergency Petition for)
Declaratory Ruling and Enforcement Order)
For Violation of Section 76.58 of the)
Commission's Rules, or in the Alternative)
For Immediate Injunctive Relief)

To: The Commission

**EMERGENCY PETITION FOR DECLARATORY RULING
AND ENFORCEMENT ORDER, OR, IN THE ALTERNATIVE, FOR
IMMEDIATE INJUNCTIVE RELIEF**

ABC, Inc. ("ABC"),¹ by its attorneys and pursuant to Sections 76.7 and 76.61 of the rules of the Federal Communications Commission ("FCC" or "Commission"),² hereby requests that the Commission, on an emergency basis, issue a Declaratory Ruling and Enforcement Order directing Time Warner Cable, a division of Time Warner

¹ ABC is the controlling parent company of the licensees of full-service commercial television stations KABC-TV (Channel 7), Los Angeles, California; KSFN-TV (Channel 30), Fresno, California; KTRK-TV (Channel 13), Houston, Texas; WABC-TV (Channel 7), New York, New York; WTVD(TV) (Channel 11), Durham, North Carolina; WLS-TV (Channel 7), Chicago, Illinois; WPVI-TV (Channel 6), Philadelphia, Pennsylvania; and WTVG-TV (Channel 13), Toledo, Ohio (collectively herein, the "ABC Stations"). The specific subsidiary licensees of each of the ABC Stations, and each station's Designated Market Area ("DMA") as assigned by Neilson Media Research, are provided in the table that accompanies this Petition as Attachment A.

² See 47 C.F.R. §§ 76.7, 76.61(a)(3) (1999).

Entertainment Company, L.P., and its affiliates (collectively "Time Warner"), immediately to comply with the provisions of Section 76.58 of its rules. If, for any reason, the Commission cannot decide the merits of this Petition immediately, it should issue injunctive relief, akin to a temporary restraining order, to restore the *status quo ante* prior to Time Warner's brazen violation of the rule. Absent grant of such immediate relief, Time Warner's conduct will make a mockery of the rule.

This section of the Commission's rules prohibits cable systems from deleting local commercial television stations during a sweeps period. Time Warner violated this section by removing ABC's owned-and-operated stations from its systems on May 1, 2000, even though the current sweeps period commenced on April 27, 2000, and continues until May 24, 2000. The relief sought relates only to the current sweeps period. The continued availability of ABC's owned-and-operated stations on Time Warner's cable systems beyond May 24, 2000, of course, will depend upon the outcome of the retransmission consent negotiations between the parties. Absent an immediate order directing Time Warner to reinstate carriage of ABC's owned-and-operated stations within a matter of hours, the protection to broadcasters and viewers afforded by the rule will be destroyed because of the extremely brief duration of the sweeps period.

I. INTRODUCTION

On May 1, 2000, Time Warner deleted carriage of the ABC Stations on all of its cable systems serving communities in the stations' DMAs. Four days earlier, on April 27, 2000, Nielsen Media Research commenced one of its regularly scheduled national

television ratings measurement periods (“audience sweeps”).³ Time Warner’s termination of carriage during this audience sweeps period violates Section 76.58 of the Commission’s rules,⁴ which expressly prohibits deletion of any local commercial television station from a cable system during audience sweeps periods.

Time Warner’s termination of carriage of the ABC Stations is flagrantly unlawful and causes demonstrable and serious harm to the public. Time Warner’s conduct bears all the hallmarks of the abusive use of monopoly power that the Congress intended to curb when it enacted the 1992 Cable Act. Notwithstanding the existence of a clear FCC rule barring deletion of carriage of a local commercial television station by a cable operator during an audience sweeps period, Time Warner has knowingly and deliberately chosen to violate the rule. Time Warner cynically accepted extension after extension of the retransmission consent agreement with ABC until the May sweeps period when Time Warner calculated that dropping carriage would cause the most competitive harm to ABC and to viewers. That is precisely the evil the rule was designed to eliminate. Such lawless behavior is the culmination of regressive negotiating demands by Time Warner and threats to extract monetary consideration from Disney in retaliation for Disney’s satellite dish promotion in Houston, Texas, intended to spur the very competition in the multichannel video programming distribution market that Time Warner abhors. The Commission must put an immediate and decisive end to Time Warner’s defiance of its rules. Accordingly, ABC requests that the Commission issue immediately an

³ See “The Sweeps” – Local Market Measurement, Nielsen Media Research, found at <http://www.nielsenmedia.com/whattratingsmean/sweeps.html> (visited 4/29/00). The May 2000 sweeps period will continue through May 24, 2000. *Id.*

⁴ 47 C.F.R. § 76.58 (1999).

Enforcement Order directing Time Warner to comply immediately with Section 76.58 by resuming today carriage of the ABC Stations on its cable systems.⁵

II. **FACTUAL BACKGROUND**

Time Warner's action comes in the midst of negotiations with ABC on the terms of a new, long-term retransmission consent agreement between the ABC Stations and Time Warner's systems.⁶ Throughout nearly eight months of negotiations, ABC has been mindful of the strong public interest that reposes in the expectations of viewers⁷ that they will continue to receive the valuable news and entertainment services provided by the ABC Stations upon which they have come to rely. Accordingly, although the last formal retransmission consent agreement between Time Warner and the ABC Stations expired on December 31, 1999, ABC repeatedly extended its consent to permit Time Warner to continue to carry the stations' signals during the parties' discussions.⁸ The most recent extension was due to expire May 1, 2000. Consistent with its past practice of doing so, ABC once again offered to extend its retransmission consent through May 24 to give the parties a chance to negotiate a lasting retransmission consent agreement. Time Warner,

⁵ The ABC owned-and-operated stations on the respective Time Warner cable television systems are identified in Attachment A hereto.

⁶ During this period the discussions among the parties often have been intensive. The parties have met for negotiations on multiple occasions and have exchanged a number of proposals and counter proposals. The substance of these negotiations is not germane to the issue now before the Commission, but these facts demonstrate sincere and *bona fide* efforts to reach an agreement on the part of ABC.

⁷ The Time Warner systems in question here serve almost 3.5 million subscribers in 128 or more communities.

⁸ In earlier stages of the negotiations, ABC extended its consent to retransmission on no fewer than five occasions: November 30, January 12, February 11, February 28, and March 31.

however, chose to reject ABC's offer apparently because it now has deemed it to be expedient or advantageous to, in its words, "drag [its] customers – and [the ABC Stations'] viewers – into our commercial dispute."⁹

Manifesting the intentional nature of the violation, Time Warner dropped the ABC stations with full knowledge of Section 76.58's requirements, and in spite of the fact that it possesses "unconditional and unequivocal consent" from ABC to continue its carriage of the stations' signals. Specifically, in earlier discussions concerning a bridge retransmission consent extension that was to expire during the February audience sweeps period, Time Warner acknowledged the existence of Section 76.58 but stated that Time Warner would not retransmit the signals of the ABC Stations absent ABC's consent to such carriage.¹⁰ Although nothing in the regulation requires such consent, to assuage Time Warner's concerns, ABC furnished its consent to Time Warner's continued carriage of the stations' signals for the duration of that sweeps period.¹¹

When it became apparent that Time Warner might not abide by the plain meaning of the Commission's rule and might drop the ABC stations during the current May sweeps, ABC, on April 26, 2000, communicated to Time Warner its unconditional authorization to carry its stations during the May sweeps period.¹² ABC reiterated this

⁹ Letter from Fred M. Dressler, Sr. V.P. of Programming, Time Warner Cable, to Anne Sweeney, President, Disney Channel, and Alan N. Braverman, Esquire, Sr. V.P. and General Counsel, ABC, Inc., dated April 26, 2000, at 2.

¹⁰ See Letter from Alan N. Braverman, Esquire, to David Christman, Esquire, Assistant General Counsel, Time Warner Cable, dated April 26, 2000. (Attached as Exhibit 1).

¹¹ *Id.*

¹² *Id.*

unconditional authorization to Time Warner on April 28, 2000.¹³ Finally, just yesterday, on April 30, 2000, ABC once again unambiguously notified Time Warner that it had ABC's "unconditional and unequivocal consent to retransmit the broadcast signals transmitted by ABC owned-and-operated stations through May 24, 2000, regardless of any extension of the retransmission consent agreement." (Emphasis added.)¹⁴ Yet, notwithstanding this express, unconditional grant of consent and the plain dictate of the Commission's rules, Time Warner deleted carriage of the stations' signals in contravention of the Commission's rules. It thereby unjustifiably and unlawfully interrupted service to millions of viewers around the country.

The Commission must act forcefully and immediately to remedy this harm to the public and to redress the assault on its rules. The Commission must issue immediately an Order formally declaring Time Warner to be in violation of Section 76.58 and directing Time Warner to reinstate immediately carriage of the ABC Stations on its systems for the remainder of the May sweeps period. This is surely a case where justice delayed is justice denied. With just 24 days remaining in the sweeps period, the Commission's failure to require immediate reinstatement of carriage would destroy the very purpose of the rule – to protect the sweeps period from anticompetitive abuses by monopoly cable operators – and instead permit Time Warner to reap the benefits of its monopolistic manipulations. The facts of this case, and the Commission law governing them, are clear on their face and support the relief requested. Nevertheless, if the Commission

¹³ See Letter from Alan N. Braverman, Esquire, to Fred M. Dressler, dated April 28, 2000. (Attached as Exhibit 2).

¹⁴ See Letter from Alan N. Braverman, Esquire, to Marc J. Apfelbaum, Esq., Sr. V.P., General Counsel, and Secretary, Time Warner Cable, dated April 30, 2000. (Attached as Exhibit 3).

determines that it needs more time to consider the issues, ABC respectfully requests that the Commission order reinstatement of carriage on an interim basis to restore the parties to *status quo ante* during the pendency of the Commission's consideration.

III. ANALYSIS

a. Time Warner's Action is a *Prima Facie* Violation of Section 76.58 of the Commission's Rules

In relevant part, Section 76.58 states that:

No deletion or repositioning of a local commercial television station shall occur during a period in which major television ratings services measure the size of audiences of local commercial television stations. For this purpose, such periods are the four national four-week periods – generally including February, May, July and November – commonly known as audience sweeps.¹⁵

This rule implements the statutory directive of Congress set forth in Section 614(b)(9) of the Act.¹⁶ When it implemented the Cable Television and Consumer Protection Act of 1992 (the "1992 Cable Act"), the Commission determined that Congress intended to apply Section 614(b)(9) to stations carried pursuant to retransmission consent as well as those carried pursuant to must-carry. Specifically, noting that "Section 614(b)(9) refers to 'a local commercial television station,'" the Commission stated, "we find that [this] provision, in fact appl[ies] to all local commercial stations carried by a cable system, and not just to must-carry stations."¹⁷

¹⁵ 47 C.F.R. § 76.58, note.

¹⁶ See 47 U.S.C. § 534(b)(9) (No deletion or repositioning of a local commercial television station shall occur during a period in which major television ratings services measure the size of audiences of local television stations).

¹⁷ See *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Carriage Issues*, MM Docket No. 92-259, Report and Order, 8 FCC Rcd 2965, 3004 ¶ 171 (1993) ("Must-Carry Report and Order"); see also *id.* n.323 (stressing that the notification requirements of Section

The Commission did not reach this conclusion lightly. The Commission devoted several paragraphs in its *Report and Order* to the interrelationship between retransmission consent and Section 614, and only after careful and explicit consideration, found that the prohibition against dropping a local commercial television station during audience sweeps covered broadcast stations carried pursuant to retransmission consent agreements.¹⁸ In so doing, the Commission concluded that protecting the integrity of the sweeps period from interference by cable operators was as important to the ongoing viability of local broadcasters as ensuring that cable operators carry the entirety of the programming of a local commercial television station and not degrade the broadcast signal. Because these protections were so integral to the central objective of the 1992 Cable Act – to protect broadcasters and the public from the exercise of the monopoly power of cable operators – the Commission determined that all three of these provisions – including the sweeps provision -- applied to all local commercial television stations, whether carried pursuant to must-carry or retransmission consent.¹⁹ The Commission affirmed that regulatory treatment on reconsideration of its *Report and Order*, emphasizing the importance of effectuating the intent of Congress to “permit the fullest application of whichever rights each television station elects to exercise.”²⁰

614(b)(9) apply to any local commercial television station and are not limited to must-carry signals).

¹⁸ *Id.*, at ¶¶ 164-171.

¹⁹ *Id.*, at ¶¶ 170-171.

²⁰ *See In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Carriage Issues*, MM Docket No. 92-259, *Memorandum Opinion and Order*, 9 FCC Rcd 6723, ¶¶ 101-105 (1994).

The organizational structure of the Commission's rules further evidences this decision. Section 76.56 of the Commission's rules codifies the station carriage obligations of Section 614 of the Act,²¹ and Section 76.64 codifies the retransmission consent provisions of Section 325 of the Act.²² The prohibition against deletion of broadcast stations during sweeps appears in neither of these rules, however. Instead, it is a stand-alone rule, Section 76.58, which, by its plain terms applies to all "local commercial television stations."²³

Under the facts of the present case, application of the rule is clear and leads ineluctably to only one conclusion: Time Warner has deliberately violated a clear FCC rule intended to confer protection of fundamental rights of broadcasters and viewers. Section 76.58's prohibition on station deletion during sweeps compels a finding of Time Warner's violation. As set forth in Attachment A, each of the ABC Stations is a "local commercial television station" relative to the Time Warner systems' DMAs²⁴ and was carried on those systems until Time Warner ceased carriage on May 1. The May sweeps period commenced on April 27, four days earlier. Where, as here, a local commercial television station has been deleted and the deletion occurred during sweeps, the only possible finding is that Section 76.58 has been violated.²⁵

²¹ 47 C.F.R. § 76.56.

²² *Id.* § 76.64.

²³ *Id.* § 76.58.

²⁴ *Id.* § 76.55(c).

²⁵ In an April 30, 2000 letter to ABC, Time Warner contends that Section 76.58 is inapposite, maintaining that if that rule applies to retransmission consent, it does so only during the term of a valid retransmission consent agreement, not after its expiration. First of all, as discussed above, there is no doubt that this rule applies to retransmission

The circumstances surrounding Time Warner's action make the violation even more egregious, reflecting precisely the arrogant abuse of monopoly power which the Commission sought to curb in implementing the 1992 Cable Act. Notwithstanding repeated extensions of the retransmission consent agreement, Time Warner determined to use the May sweeps period as a sword to refuse a further short-term extension proffered by ABC. Instead, Time Warner proposed an eight month extension, which reflected Time Warner's regressive negotiation proposal and which it knew to be unacceptable to ABC. To make matters worse, Time Warner did not definitively notify ABC of whether or not it actually would terminate carriage of the local commercial stations' broadcast. Finally, after ABC had given its unconditional authorization to Time Warner to retransmit ABC's broadcast signals no fewer than five times in the few days prior to Time Warner's cessation of carriage, Time Warner had the audacity to advise its subscribers that ABC had not consented to carriage. Such outrageous manipulation of the public and distortion of the truth can only be the product of a monopolist's mind set, emboldened by the prospect of "getting away" with a blatantly illegal act.

consent situations. Moreover, to argue that the rule applies only during the term of such an agreement would be to deny the rule any meaning. During the term of such an agreement, the agreement itself governs the conduct of the parties. Section 76.58 fills in the gap where the agreement has expired. Absent a valid retransmission consent agreement, Section 76.58 confers the protection against deletion from carriage mandated by law. Finally, Time Warner's argument, that absent a retransmission agreement, there is no basis for defining terms and conditions for carriage under Section 76.58 is equally unavailing. The FCC rules applicable to carriage of all local television stations, including the obligation to carry programming in its entirety and without material degradation and to comply with the rules governing program exclusivity, supply the fundamental terms of carriage in such a situation. Thus, there is absolutely no basis for Time Warner to deny that its action has violated Section 76.58.

b. The Commission Must Act Now to Grant Relief; Waiting a Few Days Will be Too Late

Failure by the Commission to act on an emergency basis to order the immediate reinstatement of the deleted ABC stations would completely eviscerate Section 76.58, as a practical matter. As the Commission is aware, the protection afforded by Section 76.58 necessarily is of extremely limited duration, but is nonetheless extremely important. National sweeps periods occur only four times a year and each lasts only four weeks. The current sweeps period, which commenced on April 27, 2000, will end on May 24, 2000. The harm to broadcasters and the public from denial of carriage of programming during that statutorily and regulatorily protected period is irreparable.

In the unique case of a violation of Section 76.58, effective relief can only be granted through an immediate order reinstating carriage. Commission action after sweeps programming has been dropped would come too late to serve the essential purpose of the rule – to ensure that such programming is carried. Indeed, unless the Commission acts immediately, it might as well repeal the rule because it would have no remedial efficacy. Under similar circumstances, the Commission traditionally weighs four criteria: 1) the likelihood that the requesting party will succeed on the merits; 2) the threat of irreparable harm to the requesting party in the absence of the requested preliminary relief; 3) the degree of injury to other parties if relief is granted; and 4) the extent to which issuance of the order will further the public interest.²⁶ In applying this analysis, the Commission has recognized that no single factor is necessarily dispositive, or a prerequisite for relief. In particular, a moving party need not demonstrate irreparable

²⁶ See *In the Matter of AT&T, et al. v. Ameritech and Qwest*, 13 FCC Rcd 14508 (1998) (citing *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977) (“*Holiday Tours*”)).

injury.²⁷ Indeed, the Commission underscored the importance of harm to the public in evaluating the relative importance of the four criteria, noting that “in litigation involving administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial.”²⁸

Applying these factors to the facts of this case demonstrates that the balance of these considerations weighs overwhelmingly in favor of granting immediate relief in the nature of an injunction.

First, as discussed in detail above, Section 76.58 is unambiguous. The deletion of the ABC Stations by Time Warner violates this rule. The manner of Time Warner’s violation is flagrant, flouting the Commission’s rules and all notions of fair competition. There is no reasonable reading of the law under which Time Warner’s action could be justified. Thus, ABC has almost a certainty of success on the merits.

Second, the balance of harms, and especially harm to the public, weighs strongly in favor of the Commission entering immediately an enforcement order requiring Time Warner to reinstate carriage of the ABC stations immediately. As discussed above, the FCC’s rule itself embodies a judgment of the importance to broadcasters and the public of preserving carriage during sweeps. The Commission has properly concluded that deletion of carriage during a sweeps period, like the failure to carry the entirety of a broadcaster’s programming or material degradation of a broadcast signal, are among the

²⁷ *Id.* at 14516 n.43 (“We find no due process requirement that any single factor, such as irreparable injury to the moving party, be demonstrated as a prerequisite to issuance of a standstill order.” Citing *Southwestern Cable* 392 U.S. 157, at 180 (1968), a United States Supreme Court case upholding a standstill order in the absence of any finding)

²⁸ *Id.* (citing *Virginia Petroleum Jobbers*, 259 F.2d 921, 925).

type of potential actions by a cable operator that are so inherently injurious to the very essence of the broadcaster's competitive position that they should be forbidden across the board, whether a broadcaster has elected must-carry or retransmission consent. Both the Congress and the FCC recognized the unique importance of the sweeps period to the broadcasting business and decreed that deletion of carriage at that particular time was impermissible because of the clear competitive injury it would cause.

The harm to the public is a direct corollary of the harm to broadcasters reflected in the *per se* nature of the prohibition itself. Literally millions of viewers around the country who have come to depend on the ABC Stations for their local and national news and information, as well as for entertainment, will experience needless interruption in these services. Such harm is accentuated during the sweeps period when local commercial television stations exhibit especially compelling and occasionally unique programming. For example, unless the Commission issues immediately the order of reinstatement sought here, Time Warner subscribers will be denied the opportunity to view such ABC programming as the *Celebrity Who Wants to be A Millionaire*, Michael J. Fox's last episode of *Spin City* and important news and informational programming on *ABC News*, *Good Morning America*, *20/20* and *Nightline*. It is particularly callous to viewers for Time Warner to delete carriage during a sweeps period. These hardships could be avoided by enforcing the Commission's existing rule in Section 76.58(a) to ensure continuity of service for the next twenty four days; during which time ABC and Time Warner may work vigorously to conclude a long term retransmission consent agreement.

Finally, reinstatement of the ABC Stations presents no injury to Time Warner whatsoever. On the contrary, Time Warner and its subscribers benefit from continuity of the valuable programming services provided by the ABC Stations. Moreover, although not required by the rule, ABC has furnished Time Warner with its unconditional consent to retransmit the ABC Stations for the duration of the sweeps period. Therefore, Time Warner may carry the programming without incurring any countervailing obligation to ABC, other than these imposed by law.

IV. CONCLUSION

The unilateral termination of the carriage of the ABC Stations on Time Warner's systems around the country during the May audience sweeps constitutes a flagrant and brazen violation of Section 76.58(a) of the Commission's rules. Time Warner's willful and deliberate abrogation of its statutory and regulatory obligation inflicts severe harm on the public. It is imperative that the Commission send a clear signal that monopolistic overreaching of the type exhibited here by Time Warner will not be tolerated, not even for one day during sweeps period. Unless the Commission enters an immediate order, essentially in the form of an injunction, to restore carriage of ABC's stations on Time Warner's cable systems, the Commission will have bid *adieu* to a rule, mandated by statute, which is critical to protect competition and which it labored long and thoughtfully to create. It will have failed in its core responsibility to protect the public interest.

Accordingly, ABC respectfully requests that the Commission immediately declare Time Warner to be in violation of the Commission's rule and order it to reinstate immediately carriage of the ABC Stations.

Respectfully submitted,

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